



IN THE
Supreme Court of the United States
OCTOBER TERM, 1976.

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT
COUNCIL OF CARPENTERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF CALIFORNIA.

**BRIEF OF THE AMERICAN RETAIL FEDERATION,
AS AMICUS CURIAE, IN SUPPORT OF
THE PETITIONER.**

JOHN W. NOBLE, JR.,

PAUL B. SCHECHTER,

FRIEDMAN & KOVEN,

208 South LaSalle Street,

Chicago, Illinois 60604,

*Attorneys for the American
Retail Federation.*

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**BRIEF OF THE AMERICAN RETAIL FEDERATION,
AS AMICUS CURIAE, IN SUPPORT OF
THE PETITIONER.**

The American Retail Federation hereby files a brief *amicus curiae* in support of the Petitioner, Sears, Roebuck and Co.¹

I.

INTEREST OF THE AMICUS CURIAE.

The interest of the American Retail Federation as *Amicus Curiae* is set forth in its Brief *Amicus Curiae* filed in support of the Petition for Writ of Certiorari herein.

1. Each party has previously filed with the Clerk of the Court his written consent to the participation of the *amicus curiae* pursuant to Rule 42 of the Rules of this Court.

Amicus emphasizes that the membership of its constituent state and national associations consists of retailers of all sizes including small, locally-owned shops as well as large retail chains. While issues presented by this case concern all retailers, they are of particular importance to the small local retailer, the so-called "mom-and-pop store," which is especially vulnerable to being embroiled in labor disputes not of its own making. This is due to the large number of suppliers, services and transportation companies with which it deals. Such a local business must rely primarily on the local courts for the protection and preservation of its rights.

The Federation believes that the issues presented herein must be considered not only in the context of the major retail chain located in a large urban environment but also keeping in mind the interests of the small retailer in its community.

II.

SUMMARY OF THE ARGUMENT.

The National Labor Relations Act (hereinafter "the Act") 29 U. S. C. § 151 *et seq.*, neither establishes nor protects the right to engage in labor-related activity which trespasses upon private property. Access by union representatives to private property has been required by the National Labor Relations Board and this Court only in the limited context of union organizing efforts and then only upon a showing of necessity. This Court's assertion that "accommodation" of employee rights guaranteed by Section 7 of the Act, 29 U. S. C. § 157 may sometimes require a "yielding" of private property rights, suggests the conclusion that the rights of the property owner must be considered superior until a compelling need to impinge upon those rights can be demonstrated before the National Labor Relations Board.

The National Labor Relations Act provides no means by which an aggrieved property owner can assert and protect its

rights by instituting an unfair labor practice charge before the National Labor Relations Board. Thus, the property owner's only means of placing the issue before the Labor Board is to deny access to the labor organization which can then seek redress by filing an unfair labor practice charge. Forcible expulsion by the property owner of the trespasser is an undesirable means of accomplishing this result. The various states have a deeply rooted interest in obviating the necessity for forcible expulsion because of the confrontation and potential breach of the peace it necessarily entails. Thus, in the absence of recourse to the Labor Board, the state courts provide an acceptable means for the property owner to assert and protect his rights during the pendency of the labor organization's efforts to convince the Labor Board that, in the context of the particular case, the private property must yield. In exercising its jurisdiction to maintain the *status quo ante*, the state court need not rule upon, or even consider, the issues pending before the Labor Board. Moreover, the state court's injunctive order need survive only until the Labor Board determines the issue before it. If the Labor Board determines that the property rights must yield, the state court may vacate its injunction or may be required to do so by the Labor Board through action in the federal courts.

III.

ARGUMENT.

A. Nothing in the National Labor Relations Act Establishes or Condone Trespass Upon the Property of Another. This Court Has Approved Only a Limited Right of Access to Private Property to Accommodate Rights Created Under the Act in NLRB v. Babcock & Wilcox.

In *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959) this Court announced a general rule that:

1. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are pro-

tected by § 7 of the Taft-Hartley Act or constitute an unfair labor practice under § 8, due regard for the federal enactment requires state court jurisdiction must yield. . . ."

2. ". . . However, due regard for the presuppositions of our embracing federal system including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the State of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act (citations omitted) or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (footnote omitted) 359 U. S. at 243-244.

Nothing in Section 7 of the National Labor Relations Act, 29 U. S. C. § 157, establishes the right to or condones the commission of an intentional tort or a violation of state civil or criminal law. Section 7 of the Act provides that:

"Employees shall have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

No construction of Section 8(a) of the Act, 29 U. S. C. § 158(a), which protects Section 7 rights from violation by employers, holds that employees or union representatives may commit intentional torts or violate state civil or criminal law in furtherance of the exercise of those Section 7 rights. *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, No. 75-804, 94 LRRM 2759 (U. S. Sup. Ct., 1977).

Similarly, nothing in Section 8(b) of the Act, 29 U. S. C. § 158(b), provides that intentionally tortious labor organization conduct or violation of other civil or criminal law by employees or labor organizations is prohibited by the Act, unless that conduct restrains or coerces employees in the exercise of their Section 7 rights. No construction of Section 8(b) of the Act protects a property owner from trespass. *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, supra*. A property owner, whether or not the employer of the employees whose rights are involved, will not find protection against trespassory activity under existing federal statute or decision.

It must be concluded that trespass is an activity neither protected nor prohibited by the National Labor Relations Act.

It is illogical to conclude, however, that Congress left this conduct unregulated and open to the free play of opposing economic or physical forces.

". . . The protection of private property, whether a home, factory or store, through trespass laws is historically a concern of state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer within the National Labor Relations Act (NLRA) to prevent an illegal trespass on his premises.

"Rather, it has acted against the backdrop of the general application of state trespass laws to provide certain protections to employees through § 7 of the NLRA, 61 Stat 140, 29 U.S.C. § 157. A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action but would leave intact the narrower restraint present in federal law through § 7 and would thereby artificially create a no-law area." *Taggart v. Weinacker's*, 397 U. S. 233 at 227-228 (1970) (Burger, C. J., concurring) See also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. R. 1337 at 1355-1356 (1972).

Moreover, unlike cases where this Court has determined that Congress intended to leave a subject unregulated, *Lodge 76*,

International Assn. of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U. S. 132, 92 LRRM 2881 (1976), the states in trespass cases need not rule upon the merits of the parties' positions under the Act. Thus, they have no potential for interference with the administration of a national labor policy.

The right of access to the property of another for the purpose of exercising Section 7 rights is not created by the statute but is a creature of decisional law. It has been established by the Board and approved by this Court to operate in limited circumstances. In *NLRB v. Babcock & Wilcox*, 351 U. S. 105, 38 LRRM 2001 (1956), this Court held that, in the context of a labor organizing campaign, a property owner has no obligation to open his property to a labor organization seeking to organize his employees unless need can first be demonstrated in a Labor Board proceeding that there exists no suitable alternative means of reaching the employees.

"It is our judgment however that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders these cases permit." 351 U. S. at 112.

B. The Requirement That Private Property Rights Yield in Limited Circumstances Is Not Based Upon Any Constitutional Considerations. Private Property Rights Are Superior to Those Created by the National Labor Relations Act.

In *Central Hardware Co. v. NLRB*, 407 U. S. 539, 80 LRRM 2769 (1972) and *Hudgens v. NLRB*, 424 U. S. 507, 91 LRRM 2489 (1976), this Court has firmly established that union rep-

resentatives' access to property in a labor matter is not founded upon any constitutional considerations. That right of access exists only to the extent the Labor Board determines that the property owner's rights must yield to those of employees under Section 7 of the Act.²

In *Central Hardware*, this Court emphasized that private property rights prevail absent a showing that they must yield and that this principle has only been established in the context of a labor organizing campaign.

"The principle of *Babcock* is limited to this accommodation between organization rights and property rights. This principle requires a 'yielding' of property rights only in the context of an organization campaign. Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." 407 U. S. at 544-545, 80 LRRM at 2771.

Later, in *Hudgens*, this Court said:

"... Under the Act the task of the Board, subject to review by the Courts, is to resolve conflicts between § 7

2. Thus, those state court decisions denying injunctive relief or overturning criminal trespass convictions based upon the theory that the labor organization's representatives were exercising First Amendment rights are no longer viable. See *Local 802 v. Asimos*, 227 S. W. 2d 154 (S. Ct. Ark., 1950); *In Re Lane*, 79 Cal. Rptr. 729, 457 P. 2d 561 (1969); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Worker's Union, Local No. 31*, 40 Cal. Rptr. 233, 394 P. 2d 921 (1964); *Maryland v. Williams*, 44 LRRM 2357 (Baltimore City Criminal Court, 1959); *Jones v. Demoulas Super Markets, Inc.*, 308 N. E. 2d 512 (Supreme Judicial Court of Mass., 1974); *Amalgamated Clothing Workers v. Wonderland Shopping Center*, 370 Mich. 547, 122 N. W. 2d 785 (1963); *Millmen Union, Local 324 v. Missouri-Kansas-Texas R. Co.*, 253 S. W. 2d 450 (Court of Civil Appeals, Texas, 1952).

rights and private property rights, 'and to seek a proper accommodation between the two.' [Citing *Central Hardware*] What is 'a proper accommodation' in any situation may largely depend upon the content and the context of the § 7 rights being asserted. . . ." 424 U. S. at 521.

Thus, this Court has adopted the view that private property rights may or may not be required to yield, or may be required to yield to a greater or lesser degree, depending upon the nature of the labor organization's claim. The Labor Board must determine the extent to which such property rights must yield in each category of situation. In the words of the Court:

"The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.' (footnote omitted) The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance. (Citations omitted) . . ." 424 U. S. at 522.

Recognizing the factual distinctions between the *Babcock & Wilcox/Central Hardware* cases and the facts presented in *Hudgens*, this Court ordered the matter remanded to the Labor Board for consideration, 424 U. S. at 523. The remanded case is currently pending before the Board.

C. The Exercise of State Jurisdiction to Enforce General Trespass Laws Falls Squarely Within the *Garmon* exceptions for Those Deeply Rooted in Local Feeling and Responsibility and of Only Peripheral Concern to the Administration of National Labor Policy.

Having concluded, as has this Court, that an owner of private property can deny access to representatives of labor organizations except when the Labor Board requires that the owner's

rights yield to those created by the Act, we turn to a consideration of the role of state courts in applying the general trespass laws of their respective jurisdictions.

Safeguarding its residents from violations of their rights, prevention of violence and maintenance of order are matters of state interest deeply rooted in local feeling and responsibility. *Farmer v. United Brotherhood of Carpenters and Joiners of America*, *supra*; *Linn v. Plant Guard Workers*, 383 U. S. 53, 61 LRRM 2345 (1966); *United Automobile Workers v. Russell*, 356 U. S. 634, 42 LRRM 2142 (1958); *United Construction Workers v. Laburnam Construction Corp.*, 347 U. S. 656, 34 LRRM 2229 (1954). The assertion of jurisdiction by state court in those jurisdictions where the preemption argument has been rejected, has been based upon recognition that there is no other forum in which the property owner may assert its rights. The absence of legal recourse if state jurisdiction is denied breeds contempt for the law, resort to self-help and the inherent risk of violence and breach of the peace. Thus, for example, the Illinois Supreme Court, in *May Department Stores Company v. Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7, 93 LRRM 2592 (1976) held:

"In *People v. Goduto* (1961) 21 Ill.2d 605, 48 LRRM 2126, we held that the State courts have the power to enforce the criminal trespass laws against nonemployee union organizers under circumstances analogous to the case at bar. In *Goduto*, two defendants entered upon the parking lot of a retail store for the sole purpose of distributing union literature to employees of the store. The defendants were arrested after they refused to leave the property when requested to do so by the store's manager. Their subsequent convictions for trespassing were upheld by this court.

"The foundation of our opinion in *Goduto* was that an imminent threat of violence exists whenever an employer is required to resort to self-help in order to vindicate his property rights. Such a situation would result from our

acceptance of the union's contention that State courts have no authority to act against a trespass by nonemployee union organizers. Since trespass by a union organizer is not an unfair labor practice the NLRB is unable to grant any relief to a deserving employer. If the employer is also denied access to the State courts his only recourse is to employ self-help. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1362-63 (1972).

"This imminent threat of violence which is inherent in any situation in which an aggrieved party is denied access to a court of law has been recognized by the United States Supreme Court. In *Linn v. United Plant Guard Workers, Local 114* (1966), 383 U.S. 53, 15 L.Ed.2d 582, 86 S.Ct. 657, 61 LRRM 2345, the court allowed State court jurisdiction over an action for malicious libel which had resulted from a union organizational campaign. The Linn court noted:

'The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized.' 383 U.S. 53, 64 n.6, 15 L.Ed.2d 582, 590 n.6, 86 S.Ct. 657, 664 n.6.

"We consider the foregoing statement fully applicable to the historic and deeply rooted interest of the State in maintaining domestic peace through application of its trespass law remedies. We adhere to the holding of *Goduto* that under the *Garmon* doctrine the States are not preempted from jurisdiction of a trespass action involving nonemployee union organizers." (Emphasis added.) 64 Ill. 2d at 162-163.

Similarly, the New York Court of Appeals expressed this concern in *People v. Bush*, 39 N. Y. 2d 529, 92 LRRM 3268 (1976) as did the Alabama Supreme Court in *Taggart v. Weinacker's, Inc.*, 283 Ala. 171, 214 So. 2d 913 (1968), cert. granted 396 U. S. 813 (1969) cert. dism. 397 U. S. 223 (1970) and the Tennessee Supreme Court in *Hood v. Stafford*, 213 Tenn. 864, 56 LRRM 2340 (1964).

The risk of violence resulting from resort to self-help to eject a stranger from one's property is substantial. It must therefore be recognized that to deprive a state court of jurisdiction to enforce its trespass laws invites opportunities for confrontation by resort to self-help. To whom does a business owner turn when confronted by a union representative who insists on soliciting employees on the sales floor when other means of communication are readily available? *Fortunoff Silver Sales v. Heller*, 94 LRRM 2484 (N. Y. Sup. Ct., 1977). Similarly, where does the property owner turn when a union representative enters a store to convince customers not to purchase goods produced by an unrelated company whose employees are on strike? Absent enforceability of trespass laws or the availability of injunctive relief, the owner is left to his own devices. It is no solution to suggest that forcible ejection may result in the filing of an unfair labor practice charge by the union after which the Labor Board may decide whether the property owner, under some balancing test, had to "accommodate" to rights established under the Act.

The danger of the present state of the law is illustrated by the case of *Wiggins & Co. v. Retail Clerks Union*, 93 LRRM 2782 (Tennessee Chancery Court, Knox County, 1976). There the plaintiff, Wiggins, owned a plot of land which he leased to Kresge which built a store and subleased a portion to Giant Food Markets. On Giant's opening day, defendant union's representatives established an informational picket on the sidewalk directly in front of the Giant store. Despite the request of Kresge and Giant, the pickets refused to leave the private property. The following day, Wiggins sought and was granted a temporary injunction requiring the pickets to continue their activity beyond the private property line. The union filed an unfair labor practice charge with the Labor Board but never filed a petition with the Labor Board seeking to represent Giant's employees.

The court later dissolved the temporary injunction relying on *Hudgens*.

"In *Hudgens* the Supreme Court has very clearly said that where a total prohibition against picketing upon all shopping center property was sought, it is a matter to be decided by the NLRB in the first instance. Whether or not the Supreme Court meant to say this, it did. . . . a state court, including this Court, cannot determine whether pickets may be totally excluded from the sidewalks and area surrounding the outside of a shopping center even though that area is private property. If there is to be such a total exclusion, that is for the NLRB to order. The language used by the Supreme Court in *Hudgens* will have to be modified to reach a different result." 93 LRRM at 2783.

The court obviously did not understand the rationale of *Hudgens* or that of *Central Hardware* in overruling *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U. S. 308 (1968), nor the *Hudgens* remand to the Board. Neither did it know the limited jurisdiction of the Labor Board. Had the court recognized the primacy of private property rights absent a showing that a "yielding" was necessary, and had the Court understood that the property owner could not institute Labor Board proceedings to determine whether pickets may be totally excluded, its holding surely would have been different. Under its rationale however, the property owner, Wiggins, would have been subjected to an indeterminable period of stranger picketing and trespass with no remedy but self-help, exactly the result dreaded and rejected by its own Tennessee Supreme Court in *Hood v. Stafford*, *supra*.

Since the burden of establishing that property rights must yield to Section 7 rights is upon the labor organization, the proper role of the state court is the preservation of the peace while the Labor Board, upon request of the labor organization, balances the respective needs.

Such is the posture assumed by the New York Supreme Court in *People v. Bush*, *supra*.

"It would appear to follow that union members such as the defendants in our case, providing they have com-

plied with proper procedures, do not necessarily need to be deprived of legitimate statutory rights by the employment of state trespass law. Under the preemption doctrine of *Garmon*, it is not for us to say whether, had they [the trespassers] applied to the NLRB, they could have brought themselves within the limitations set out in *Babcock* and *Hudgens*. It is our province, however, to say that they should have ascertained these limits as they applied to the picketing in question here before remaining intransigently on private property." 39 N. Y. 2d at 537, 92 LRRM at 3272.

The Illinois Supreme Court in *May*, *supra*, similarly noted this Court's conclusion that private property rights prevail absent a showing of need for encroachment in analyzing its role. In the *May* case, the property owner sought an injunction against the union's trespass. The union filed an unfair labor practice charge with the Labor Board. In approving the lower court's issuance of an injunction,³ the Illinois Supreme Court said:

"We do not consider the mere filing of a charge by the union to be sufficient to divest the State courts of the jurisdiction which otherwise results from the exceptions listed in *Garmon*. The fact that a charge is on file does not remove the compelling interests which justify the existence of State jurisdiction. The imminent threat of violence occasioned by an unauthorized trespass is not rendered less immediate by simply filing an unfair labor practice charge, nor is the State's interest in preventing violence any less significant. As a practical matter, acceptance of the appellate court's reasoning would result in the emasculation of the *Goduto* principle since a union could then unilaterally divest the court of jurisdiction by the mere filing of a charge regardless of its merit. We accordingly conclude that the filing of the unfair labor practice charge in the present case did not affect the jurisdiction of the circuit court. See also *Linn v. United Plant Guard Workers, Local 114* (1966), 383 U.S. 53, 57, 15 L.Ed.2d 582, 586, 86 S.Ct. 657, 61 LRRM 2345; *Hood v. Stafford*

3. The Illinois Appellate Court had reversed the Circuit Court of Cook County. 32 Ill. App. 3d 916 (1975).

(1964), 213 Tenn. 864, 378 S.W.2d 766, 768, 56 LRRM 2340, in which State jurisdiction was upheld despite the pendency of various proceedings before the NLRB." 64 Ill. 2d at 163-164.

When the role of the state courts is viewed in this manner, it cannot be regarded as interfering with the Labor Board's primacy in the area of labor law or threatening the existence of a national labor policy. The exercise of state jurisdiction to maintain the *status quo ante* until the Labor Board determines whether the trespass must be "accommodated" is therefore of "merely peripheral concern of the Labor Management Relations Act," *San Diego Building Trades Council v. Garmon*, *supra*, and is the traditional function of state equity courts.

The issues placed before the state court can be adjudicated without reference to the merits of the underlying labor dispute. *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, *supra*. In fact, the availability of the state forum to maintain the *status quo* enhances the Labor Board's procedures. It provides a means whereby a property owner, concerned with asserting the integrity of his interests, can encourage the trespasser to invoke the Labor Board's processes without the property owner having to resort to self-help or other means which might result in confrontation and a breach of peace.

The duration of the state court's injunction may be brief, lasting long enough for the Labor Board to decide whether and to what degree the private property must yield. State courts which have exercised such jurisdiction have recognized its temporary nature.

"The temporary injunction entered by the circuit court did not present a potential conflict with Federal labor policy, nor did it adversely affect any rights granted the union by the NLRA. The injunction was narrowly aimed at organizational activity on company property and specifically noted that it was not to apply to solicitation on the public sidewalks adjacent to the Venture parking lot. The

temporary injunction merely had the effect of maintaining the status quo during the pendency of the NLRB proceedings. No prejudice to the union could result from this pattern since the injunction could have been vacated immediately upon an NLRB finding in favor of the union. In the highly unlikely event that the circuit court would refuse to vacate the injunction in these circumstances, the NLRB could provide relief by seeking to enjoin the order of the State court. *NLRB v. Nash-Finch Co.* (1971), 404 U. S. 138, 30 L. Ed. 2d 328, 92 S. Ct. 373, 78 LRRM 2967.

"The employer, on the other hand, would suffer serious harm were it unable to secure injunctive relief against non-employee union organizers while the NLRB was considering whether an unfair labor practice complaint should issue. An employer in Venture's situation cannot obtain equitable relief from the NLRB. (Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1362-63 (1972).) If Venture had been precluded from applying to the State court to maintain the status quo, it would have been required to endure eight months of trespass activity by the union as the result of a charge filed with the NLRB." *May Department Stores Company v. Teamsters Local 743*, *supra*, 64 Ill. 2d at 164-165.

The state court, in the exercise of its jurisdiction, is competent to deal with the necessary temporary accommodation of rights under the guidance of the Labor Board. The traditional role of equity courts has required them to deal with issues of probabilities and irreparable harm. Under the guidelines set forth in the *Babcock & Wilcox* decision, the state courts can presently determine which party is more likely to suffer irreparable harm if the *status quo* is not maintained pending Labor Board decision. When the Labor Board rules pursuant to the remand from this Court in *Hudgens*, the state courts will have standards to apply in the context of picketing in

economic disputes, and over time the Board will provide guidance in the context of other situations.⁴

Inasmuch as the exercise of state jurisdiction touches interests deeply rooted in local feeling and responsibility and regulates activity of only peripheral concern to the Labor Act, it is not preempted, absent compelling congressional direction to the contrary. *San Diego Building Trades Council v. Garmon*, *supra*. The absence of such compelling congressional direction, and indeed the existence of a contrary intent on the part of Congress, has already been noted by Chief Justice Burger in his concurring opinion in *Taggart v. Weinacker's*, quoted *supra* at p. 5.

The California Supreme Court stands virtually alone in its decision that *Garmon* precludes enforcement of state trespass remedies and its decision in the instant case relies solely on prior decisions within its own jurisdiction.

The California Court bases its conclusion on an erroneous evaluation of the role of the state courts in these matters. In declining jurisdiction it relies on the "arguably protected or prohibited" standards set forth in *Garmon* and expresses concern that the exercise of such jurisdiction will interfere with the administration of uniform national labor policy. See fn. 3, 17 C. 3d 893 at 899, 93 LRRM 2161 at 2163. Clearly, the California Supreme Court viewed the states as becoming involved in deciding the issue of access rather than simply preserving property rights in *status quo* pending Labor Board resolution of that issue.

Further, while the court below recognized the absence of remedy for the property owner as noted by Chief Justice Burger

4. As suggested above, to provide for the property owner's resort to the state courts to seek protection of the state trespass laws, rather than leaving him no remedy except self-help, peacefully encourages labor organizations to place the question before the Labor Board for resolution. The fact that the Labor Board has not yet provided guidance in every situation should not deprive the state courts of jurisdiction.

in his *Taggart* opinion, 17 C. 3d at 905, 93 LRRM at 2166, it nevertheless felt compelled to adhere to its own earlier decisions erroneously construing *Garmon*. The court below then suggested that if its understanding of *Garmon* is incorrect, it was because the *Garmon* rule requires clarification. 17 C. 3d at 906, 93 LRRM 2167.

The better rule is that set forth in the well-reasoned decisions of the Illinois Supreme Court in *May* and the New York Court of Appeals in *Bush* which adopt an appropriate role for the state and leave the decision on the merits to the Labor Board.⁵

IV.

CONCLUSION.

For all the foregoing reasons, the exercise of state court jurisdiction to enforce local trespass laws, which maintain the *status quo* and peacefully encourage resort to the National Labor Relations Board to determine the relative rights of the property owner and labor organization, is not preempted by the National Labor Relations Act. The American Retail Federation therefore respectfully requests that the judgment and decision of the Supreme Court of California be reversed.

Respectfully submitted,

JOHN W. NOBLE, JR.,

PAUL B. SCHECHTER,

FRIEDMAN & KOVEN,

208 South LaSalle Street,

Chicago, Illinois 60604,

*Attorneys for the American
Retail Federation.*

5. In addition, the Supreme Courts of the following states have considered and rejected preemption of their jurisdiction to enforce the state trespass laws: *Hood v. Stafford*, 213 Tenn. 864, 56 LRRM 2340 (1964); *Taggart v. Weinacker's*, 283 Ala. 171, 69 LRRM 2348 (1968) *cert. granted* 396 U. S. 813 (1969) *cert. dismissed* 397 U. S. 223 (1970); *Moreland Corp. v. Retail Store Union*, 114 N. W. 2d 876, 50 LRRM 2092 (Wis. S. Ct. 1962).